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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Balancing fairness and public interest in hearings on the merits in discipline proceedings: *Abdul v Ontario College of Pharmacists,* 2018 ONCA 699[1]

Facts: The Health Professions Procedural Code[2] (the "Code") contemplates two mechanisms through which concerns about members' conduct may be assessed: a complaint or a Registrar-initiated investigation. In either case, allegations of professional misconduct must pass through the Inquiries, Complaints and Reports Committee ("ICRC") for screening before they may be referred to the Discipline Committee.

The College received information that A, a pharmacist and member of the College, was re-dispensing unused medication to patients. The information came in two different forms: an oral conversation with CD, and a written complaint from a different source, GV. The College did not act on the written complaint from GV within the timeframes contemplated by the Code, but a Registrar-initiated investigation is not subject to the same time prescriptions.

Weeks after the deadline to act on the written complaint had passed, a representative of the College contacted the complainant GV to

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[1] Stockwoods was counsel for the appellant College in this case.

[2] Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c 18.

explain the process, including the difference between a complaint and a Registrar-initiated investigation. GV was told that either option remained available. GV elected to withdraw her complaint so that allegation could proceed through the Registrar-initiated process, which would require less involvement on her part. The Registrar then initiated an investigation, and the matter was ultimately referred to the Discipline Committee by the ICRC.

A brought a motion to quash the charges on the ground that the College had lost jurisdiction to prosecute the allegations for failing to abide by the complaints process mandated by its legislation. A majority of the Discipline Committee dismissed the motion, finding that the College had followed the procedural conditions for a Registrar-initiated investigation and therefore retained jurisdiction. A dissenting panel member concluded that the procedural irregularity constituted an abuse of process.

A then brought an application for judicial review based on the Discipline Committee's failure to find either that non-compliance with the Code resulted in loss of jurisdiction or that he had suffered prejudice amounting to an abuse of process.

The Divisional Court granted the application. It found, among other things, that the Registrar-initiated investigation was not available in the circumstances because a complaint had been made in respect of the same allegations. Failure to comply strictly with the statutory procedure for a complaint resulted in a loss of jurisdiction over the allegations. The court held that the Discipline Committee's finding that the matter had been handled properly was unreasonable.

The College appealed to the Ontario Court of Appeal.

Decision: Appeal allowed; decision of the Discipline Committee restored.

The Court of Appeal held that the Divisional Court erred in finding the Discipline Committee's decision to be unreasonable and in holding that that the Discipline Committee lacked jurisdiction to prosecute the allegations.

It would make no practical sense for the Code to preclude recourse to a Registrar-initiated investigation where the same subject matter comes to the College's attention by way of a complaint. The allegations were pursued in a manner that provided full procedural safeguards for the accused member.

The Court commented that the interpretive principle of strict compliance with and construction of professional discipline legislation to ensure procedural fairness to accused members is not exclusive or overriding. The Discipline Committee is required to interpret its enabling statute with a view to protecting the public interest in the proper regulation of the professions.

Failure to process a written complaint within the timelines prescribed by the Code does not automatically result in a loss of jurisdiction to investigate those concerns.

The Court held that the Discipline Committee took the correct approach. It looked to whether the College's treatment of the matter constituted a breach of its duty of fairness. This analysis involved a balancing of the public interest in the investigation and prosecution of allegations with the requirement of procedural fairness to accused members.

The Discipline Committee's conclusion that the Respondent's rights was reasonable and available on the record. There was no evidence of prejudice to the Respondent. Despite differences in procedure, both a complaint and Registrar-initiated investigation ensure basic procedural fairness to members accused of professional misconduct.

Commentary: The Court of Appeal's decision in *Abdul* confirms that while statutorily-prescribed procedures may approximate procedural fairness, they should not be equated with it. Procedural irregularity will not necessarily result in procedural unfairness.

A member facing allegations of professional misconduct must show prejudice when seeking to override the public interest in favour of having a discipline matter determined on its merits. Prejudice would not arise merely because a statutory provision was not strictly complied with. Even where there is prejudice to the member, the competing public interests in favour of a hearing and of hearing fairness must be balanced. This is similar to the test for an abuse of process.

In allowing the appeal, the Ontario Court of Appeal accepted the submission that because there was no procedural unfairness to the Respondent, the College's choice to accept the withdrawal of the complaint and to proceed with a Registrar-initiated process could not be criticized. In so doing, it confirmed that technical arguments will not be accepted as denying jurisdiction in absence of any demonstrated prejudice.

CJC reports and recommendations are subject to judicial review: *Girouard v. Canada (Attorney General)*, 2018 FC 865

FACTS: This case is the most recent decision in Federal Court proceedings arising from applications for judicial review brought by Quebec Superior Court Justice Michel Girouard. The Canadian Judicial Council ("CJC") moved to strike Justice Girouard's applications for judicial review on the basis that the Federal Court has no jurisdiction to grant a remedy against the CJC or its Inquiry Committee because they are not a "federal board, commission or other tribunal" subject to review under s 2 of the *Federal Courts Act*.[3] The CJC also argued that the *Judges Act*[4] grants the CJC the status of a superior court such that it is "beyond judicial review".

The Federal Court proceedings arise out of a complaint to the CJC about Justice Girouard.

[3] RSC 1985, c F-7
[4] RSC 1985, c J-1

The CJC established a review committee to consider the complaint, and then constituted an Inquiry Committee. The Inquiry Committee dismissed the allegations, but identified several problematic areas of Justice Girouard's evidence. The Ministers of Justice of Canada and of Quebec then filed a joint complaint with the CJC regarding those problems, and the CJC struck a second Inquiry Committee. That Committee found that Justice Girouard was incapable of executing the office of a judge based on his misconduct during the first Inquiry Committee hearing, and it recommended to the Minister of Justice that Justice Girouard be removed from office. Three members of the CJC dissented.

Justice Girouard applied for judicial review of the decisions of the first and second Inquiry Committees, and other related decisions. The Federal Court granted the CJC party status for the sole purpose of challenging the Court's jurisdiction. The CJC then brought a motion to strike Justice Girouard's judicial review applications on that basis.

DECISION: Motions dismissed.

First, Noël J. held that the CJC and the inquiry Committees are federal boards, commissions, or other tribunals within the definition of the *Federal Courts Act*. Nothing in the *Constitution Act, 1867* or the *Judges Act* excludes the CJC's membership from that definition. Noël J. held the CJC's members do not act in their capacity as judges in exercising the function of the CJC, and their powers do not arise from s 96 of the *Constitution Act, 1867*. Their role on the CJC is administrative in nature. The CJC and inquiry committee's members may be judges of courts created under ss 96 and 101 of the *Constitution Act, 1867*, and can include barristers of a Canadian bar. Moreover, the CJC's name does not appear on the list of superior courts under Part I of the *Judges Act* and the chairperson of the CJC may be a retired judge. Although the CJC is granted special powers of a superior court to exercise its investigative function, the *Judges Act* does not go so far as to designate the CJC as a superior court.

Second, for similar reasons, Noël J. rejected the CJC's argument that it has the status of a superior court. Subsection 63(4) of the *Judges Act* was inserted to give CJC judges immunity, and to extend judicial protection to the judges subject to inquiry. The fact that an internal appeal mechanism exists within the CJC's procedures was insufficient for Noël J to find that judicial oversight was unnecessary.

Third, Noël J. held that the CJC's reports and conclusions are subject to judicial review by the Federal Court. Given the profound impact a report recommending removal of a judge has on that judge and his or her family, no single body can decide that judge's fate without any independent supervision or option of judicial review. Indeed, Noel J commented that a finding by the CJC that a judge has become incapacitated or disabled from the due execution of his or her office constitutes "capital punishment" for that judge's career. Finally, Noel J held that the fact that a decision is a mere "recommendation" does not make it unreviewable.

COMMENTARY: Justice Noël's reasons emphasize the importance of judicial review of statutory decision makers, even where a body is comprised of members with constitutional status in other contexts. He reiterates the longstanding principle that it is one of the "fundamental principles of our democracy" that any body exercising power, regardless of its status or the importance of its title, must be subject to independent review and held accountable. According to Noël J, this includes the CJC.

Justice Noël's statutory interpretation drove his analysis. Put simply, he held that the language of the *Constitution Act, 1867*, the *Judges Act*, and the *Federal Courts Act* do not support the CJC's argument that its decisions and recommendations are not subject to judicial review. Although not expressly discussed, Noel J's reasons are based on a fundamental tenant of administrative law: an administrative decision maker's power rises and falls with its governing legislation. At bottom, the CJC is a creature of statute. That statutory, as opposed to constitutional, status means that the CJC's constating legislation is open to amendment in the same way that legislation governing other statutory decision-makers may be amended. That the CJC's membership is comprised of at least some s 96 judges is irrelevant, since their role with the CJC is exercised in furtherance of their statutory obligations, not their s 96 jurisdiction. In contrast, superior courts cannot be stripped of their inherent jurisdiction without a constitutional amendment.[5] Parliament's inability to alter this inherent jurisdiction is critical to the preservation of judicial independence.

The role of judicial independence also features prominently in Noël J's reasons. The CJC was adamant that judicial review of the CJC's disciplinary proceedings – undertaken by senior judges and chief justices across the country – could compromise the ability of the CJC to properly exercise its functions. Noël J disagreed, finding that the availability of judicial review *increases* judicial independence by preventing inference from other branches of government. He emphasized that, in exercising their function as members of the CJC, judges do not exercise judicial, adjudicative roles pursuant to their appointments under s 96 of the *Constitution Act, 1867*. Rather, the judges sitting on the CJC exercise an "administrative" role. For this reason, the divide between the executive branch and the judiciary remains securely in place.

This decision is currently under appeal. The Federal Court of Appeal's decision in *Girouard* will be much anticipated. As Noël J notes, the CJC raised the jurisdictional arguments in 2014 in *Douglas v Canada (Attorney General)*.[6] Justice Mosley considered the issue at length in that case, and rejected the CJC's argument that the Federal Court had no jurisdiction to judicially review decisions of the CJC. The CJC appealed

[5] *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725
[6] 2014 FC 299

Mosley J's decision, but subsequently withdrew its appeal. *Girouard* now offers the Federal Court of Appeal the opportunity to rule definitively on the issue.

Government decision to exclude Tesla from extension of electric cars subsidy quashed: *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, 2018 ONSC 5062

FACTS: After the last provincial election, Ontario's new government announced that it would cancel the subsidy program for purchasers of electric cars. On July 11, 2018, it announced an extension for the subsidy that applied to (1) cars that had already been delivered and plated, and (2) inventory on dealers' lots or orders made by dealerships provided that the car is delivered and plated before September 10 (the "transition program").

The government sent letters to car dealers explaining the terms of the transition program. Tesla Motors Canada ULC ("Tesla") did not get that letter. Instead it got a customized letter saying that the transition program applied only to cars made by a "franchised auto885mobile dealership" and not where cars "have been ordered directly from an original manufacturer." Unbeknownst to the government, Tesla was and is a registered dealer in Ontario. However it is not "franchised."

Tesla applied for urgent judicial review against the government's decision to exclude it from the transition program. The court agreed and put the matter before a single judge rather than the usual panel of three (pursuant to s 6(2) of the *Judicial Review Procedure Act*[7]).

DECISION: The Divisional Court (Myers J) held that the decision under review was justiciable. Myers J first observed that there was no right to receive a subsidy on the purchase of an electric car and the government was entitled to cancel the program at any time. Neither does the court review the wisdom of government decisions. High-level policy decisions are generally immune from judicial review (they are "non-justiciable"). However lower-level operational decisions about how to execute a policy may be justiciable where they affect a person's rights or legitimate expectations. The category of operational decisions includes the decision to establish terms and conditions of the transition program, and in particular the decision to exclude Tesla.

Tesla's argument was that the government decided to exclude it from the transition program for an improper purpose. He relied on *Roncarelli v Duplessis* where the Supreme Court of Canada held that "no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant."

Myers J found that the exclusion of Tesla from the transition program did not connect to the government's stated purpose of protecting small to mid-sized dealers from the risk of not being able to return or re-sell a car where the original purchaser cancels the order. The transition program extended to all other dealers, whether large or small, and it did not depend on whether that risk materialized for the dealer in question. He also found that the transition program did not further any goal of the empowering legislation. Finally, he noted that Tesla was singled out for a measure that would cause it financial or reputational harm but did not have an opportunity to respond before the transition program was finalized. He therefore held that the government decision could not stand.

On remedy, rather than set aside the limitation of the transition program to franchised dealers (as Tesla urged), Myers J merely quashed the transition program as announced. He was not willing to reshape the transition program and require the government to fund subsidies to Tesla. He simply observed that the Minister was required to exercise his discretion in a lawful manner and had not yet done so.

[7] RSO 1990, c J.1

COMMENTARY: While Myers J's decision is appealing on an intuitive level, it leaves some questions unanswered. First, the authorities he cites on justiciability require not only that a decision be "operational" but that it affect the "rights or legitimate expectations" of the subject.[8] He recognizes that Tesla does not have a right to the continuation of the subsidy program. That would suggest that the doctrine of legitimate expectations must apply. But Myers J does not actually discuss that doctrine, let alone find that it applies. The example in *Black*, the issuance of a passport, fell into the "rights" category because "[i]n today's world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or a luxury but a necessity." In our view, some attempt to fit the Tesla facts into this concept would have made the decision more cogent.

Second, it is noteworthy that Myers J does not mention the question of standard of review. As readers will know standard of review is a somewhat vexed area of the law. Perhaps Myers J felt safe in avoiding this subject because the keystone case on "improper purpose", *Roncarelli*, a case from 1959, pre-dates the modern standard of review jurisprudence (the origin of which is often credited to *CUPE v New Brunswick Liquor Commission*[9]). However, under modern jurisprudence where, as here, a government act is challenged not for the *process* leading up to it, but for the *purpose* motivating it, one would expect a discussion of standard of review. *Roncarelli*, by contrast, comes from a time when identifying a "jurisdictional defect" was enough to overturn an administrative decision. Since then, the category of "jurisdictional question" has been downgraded from the organizing concept of judicial review to a mere reason for selecting correctness as the standard of review; more recent cases ask whether the concept should be "euthanized." The *Roncarelli* doctrine (along with the continuing vigour of the doctrine of jurisdictional questions in the criminal law of *certiorari*) may be the coelacanth of administrative law: because it developed before the law of standard of review arose, it preserves certain archaic features. Do these doctrines hint at how the Supreme Court of Canada might, in the upcoming cases designed to revisit this issue, refashion administrative law so as to unify the standards of review or (which may be practically the same thing) eliminate the question of standard of review altogether?

[8] e.g. *Black v Chretien* (2001), 54 OR (3d) 215 (CA)
[9] [1979] 2 SCR 227

Public access to adjudicative records: *Toronto Star v AG Ontario*, 2018 ONSC 2586 (SCJ)

FACTS: The Star brought a constitutional challenge to the application of the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*")[10] to 13 Ontario administrative tribunals that are designed as "institutions" under the *FIPPA* scheme. Among other things, *FIPPA* sets out the terms on which members of the public may be granted access to documents held by government and designation institutions. The Star argued that in its application to tribunals that engage adversarial processes, adjudicate disputes and act judicially or quasi-judicially, *FIPPA* violates the open courts principle protected by s 2(b) of the *Charter*. The challenge related to records (referred to as "Adjudicative Records") filed in adjudicative hearings conducted by the 13 tribunals, and the means by which those records are accessed by the press and public outside of those hearings.

The Star alleged both procedural issues and substantive issues arising from the application of *FIPPA* to Adjudicative Records. Procedurally, *FIPPA* sets out a process alleged to cause undue delay in obtaining Adjudicative Records. The process involves a series of steps with stipulated timelines, all of which can be extended as the head of the institution deems necessary. There is also an opportunity for the person requesting

[10] RSO 1990, c F.31

the record or a person affected by the disclosure to appeal to the Information and Privacy Commissioner ("IPC"). The Star gave evidence of specific access request processes ranging from a few days to many months or even years.

In terms of substance, The Star adduced evidence suggesting that the exemption under *FIPPA* for personal information is so widely invoked that it has become the rule rather than the exception. In effect, decisions about disclosure start from a premise of non-production due to personal information. The party seeking access bears the onus of demonstrating that the public interest in access outweighs the privacy interests of the personal affect. Adjudicative Records in particular are likely to fall within the definition of "personal information".

Eight of the tribunals named in the Notice of Application do not require members of the public or press to make a formal application under *FIPPA* to request Adjudicative Records.

DECISION: Application granted. Declaration that the application of certain sections[11] of the *FIPPA* to Adjudicative Records held by the named institutions infringes s 2(b) of the *Charter* and is not justified under s 1 granted but suspended for 12 months.

Justice Morgan explained that the open court principle is tied to the rights guaranteed by s 2(b). The principle includes guaranteed access to the courts and encompasses a presumptive right to Adjudicative Records. These principles apply to administrative tribunals as well as to courts.

The court concluded that in both its procedural and its substantive requirements, *FIPPA* burdens freedom of the press. The statutory presumption of non-disclosure of personal information imposes an onus on the requesting party to justify disclosure. This reverse onus makes it more difficult for the press and other document requesters to exercise their *Charter* right of access to Adjudicative Records and is an infringement of s 2(b). The delay occasioned by *FIPPA* procedures can delay or deny reportage, and also amounts to an infringement of s 2(b).

The court accepted that in seeking to protect both openness and confidentiality and to balance the openness principle with privacy concerns, *FIPPA* has a pressing and substantial objective. There is a rational connection between the application of *FIPPA* to adjudicative tribunals and the balancing that the statute aims to engage. Substantively, an across-the-board presumption of privacy and non-disclosure is not a minimal impairment. The open court principle must be the primary concern, and personal information and privacy concerns secondary to it. The deleterious effects of the presumption against disclosure outweigh the salutary effects. Procedurally, however, the court was satisfied that while there might be individual cases of unjustifiable delay, on a systemic basis the impairment is minimal.

Justice Morgan recognized that for adjudicative tribunals that rely on the *FIPPA* process to determine access to Adjudicative Records, the need to amend the *FIPPA* to make it *Charter* compliant presents practical difficulties. It is appropriate to suspend the invalidity of *FIPPA's* application to Adjudicative Records to allow the relevant sections of *FIPPA* to be amended or to allow the institutions time to establish their own means of responding to access requests in a *Charter*-compliant manner.

COMMENTARY: All adjudicative tribunals that are listed in the Schedule to the *FIPPA* regulation should take note of this decision. There can be no doubt that s 2(b) of the *Charter* guarantees access of the public and the media to Adjudicative Records – records filed in the course of public tribunal proceedings. However, many agencies have both adjudicative functions and non-adjudicative regulatory functions. And *FIPPA* does not distinguish between

[11] Specifically, ss 21(1) to (3) and related sections pertaining to the presumption of non-disclosure of "personal information".

Adjudicative Records and other records in the custody of agencies. As such, Adjudicative Records have been swept up in the reach of *FIPPA* and its protection for personal information even though they are collected by the agency for a different purpose and have a different, protected status under the *Charter*.

Some tribunals, recognizing the open court protections owing to Adjudicative Records, have elected not to follow the *FIPPA* regime for access requests for those documents. Instead, they effectively apply what is known as the *Dagenais/Mentuck* test[12] - a test developed by the Supreme Court of Canada to govern discretionary restrictions on media access to court proceedings. The test requires the party opposing media access to demonstrate that the order sought is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the order sought outweigh the deleterious effects on the rights and interests of the parties.

Because the court suspended the declaration of invalidity, tribunals may continue to follow *FIPPA* for now and wait to see what the legislature does in response to the court's decision. However, given the importance of open tribunal proceedings, all tribunals would do well to consider how they can incorporate the *Dagenais/Mentuck* approach into their determination of access requests. To simply default to broad protection of privacy and stance of non-disclosure fails to give due regard to the constitutional status of the open court principle, as embodied in s 2(b) of the *Charter*.

[12] Named after two Supreme Court cases in which the test was developed: *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 and *R v Mentuck*, [2001] 3 SCR 442.

Lack of decision-maker independence: *Shuttleworth v Licence Appeal Tribunal*, 2018 ONSC 3790 (Div Ct)

Facts: The applicant, S, suffered injuries as a result of a car accident. The Licence Appeal Tribunal ("LAT") adjudicator decided that S's injuries were not serious enough to entitle her to benefits for catastrophic impairment under the relevant *Statutory Accident Benefits Schedule.*

Several months later, S's counsel received an anonymous note. The note stated that after the LAT adjudicator wrote the decision in S's case, that decision was reviewed by the executive chair of the umbrella organization, Safety, Licensing, Appeals and Standards Ontario ("SLASTO"). According to the note, the executive chair changed the decision to make S *not* catastrophically impaired. Other information on the note (including the name of counsel and the file number) suggest its author as familiar with some of the circumstances of S's case.

Pursuant to the statutory scheme governing LAT and SLATSO, no person may be (re-) appointed to LAT unless the executive chair of SLATSO recommends their (re-)appointment.

After asking LAT for further information about the process leading to the adjudicator's decision through an access to information request, S discovered that pursuant to an unwritten review process imposed by the executive chair, the adjudicator's draft decision was sent to the executive chair by the SLATSO Legal Services Unit for her review and comments. The executive chair provided comments; the adjudicator thanked her for those comments; further revisions were made to the reasons for decision; and then the decision was released.

S brought an application for judicial review, seeking to have the adjudicator's decision set aside on the basis her independence was compromised by the consultation process imposed by the executive chair. S also argued that there was reason to believe the chair

changed the adjudicator's decision, although there was no way to know for certain (LAT refused to provide evidence to confirm the revisions made by the executive chair).

Decision. Application allowed. Adjudicator's decision set aside and matter remitted for a new hearing.

As a preliminary matter, the Divisional Court dismissed the argument that S was barred from having her application heard on the merits because she had not sought "reconsideration" of the LAT decision pursuant to the statutory scheme. The Court held that reconsideration "is not an absolute prerequisite to judicial review" and that the application for judicial review should proceed since the reconsideration process "is effected by the executive chair who is also the person who edited the draft decision."

Turning to the merits of the application, the Court affirmed that to avoid a reasonable apprehension of lack of independence by the decision-maker and comply with the rules of natural justice, three basic principles must be followed.

First, the consultation proceeding cannot be imposed by a superior level of authority within the administrative hierarchy, but can be requested only by the adjudicators themselves.

Second, the consultation must be limited to questions of policy and law. Members of the organization who have not heard the evidence cannot be allowed to re-assess it. The consultation must proceed on the basis of the facts as stated by the members who heard the evidence.

Finally, even on questions of law and policy, decision-makers must remain free to take whatever decision they deem right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal.

As long as these principles are followed, decision-makers may consult with their colleagues – and even change their minds as a result of those consultations – without having the resulting decision set aside.

In this case, the Court held that the first principle had been broken: the unwritten review process was not requested by the adjudicator, but rather imposed by the executive chair, who was a person at a supervisory level of authority within the administrative hierarchy. Importantly, the lack of any formal or written policy meant that the Adjudicator's right to decline to participate in the review process, or to reject changes proposed by the executive chair, was not protected.

The Court found that on the record it was unable to conclude there was an actual lack of independence in S's case.

COMMENTARY: This is one of those very rare cases where a reviewing court finds there to be a reasonable apprehension of a lack of independence by a decision-maker. For that reason alone, it has been the source of much discussion in the legal community.

At least three key points stand out from the Divisional Court's decision.

First, as a practical matter, judicial review may be available in these cases without exhausting the administrative process below – particularly if the allegation is that the lack of independence stems from the influence of the very person who would be in charge of any such process. While the Divisional Court's decision does not couch its conclusion in these terms, it seems that this kind of situation falls within the narrow ambit of "exceptional circumstances" that would allow an applicant to avoid having relief barred by the doctrine of prematurity or adequate alternative remedies.

Second, from the perspective of counsel acting for tribunals, this case highlights the potential risks of failing to codify the consultative

process. The Divisional Court relied heavily on the fact that the process here was not written – and thus not subject to any kind of public accountability or transparency – in concluding that it was effectively imposed on the adjudicator.

Third, this case highlights how much harder it is to challenge an administrative decision for failing to respect the *audi alteram partem* rule, as compared to proving a reasonable apprehension that a decision maker lacked independence. The latter requires only requires a reasonable apprehension standard, while one must prove an *actual* breach of the *audi alteram partem* rule.[13] Moreover, the evidence required to prove a reasonable apprehension that a decision maker lacked independence will, at least for the most part, not attract deliberative secrecy: the evidence speaks to the consultative process in place, rather than discussions around the outcome of a particular case. That was why S was able to access most of what she required by way of access to information requests. By contrast, to prove a breach of the *audi alteram partem* rule, an applicant must normally seek to delve into the records around how a particular decision was reached. In so doing, they face serious legal hurdles given the Supreme Court's commitment to protecting the deliberative secrecy of administrative tribunals.[14]

On October 5, 2018, the Court of Appeal for Ontario granted leave to appeal in *Shuttleworth*, which suggests that – one way or another – the case will wind up being of significant importance, not only for the functioning of SLATSO and LAT, but also for other administrative tribunals that rely on consultative processes.

[13] *Ellis-Don Ltd v Ontario (Labour Relations Board)*, [2001] 1 SCR 221 at para 49.
[14] *Ibid.* at paras. 52-55.

Jurisdiction over pre-registration conduct: *Association of Professional Engineers of Ontario v Leung*, 2018 ONSC 4527

FACTS: The Association of Professional Engineers of Ontario brought professional misconduct proceedings against L and his professional engineering corporation, JIT Professional Services. The allegations related to conduct that had occurred at a time when L held a licence from the Association, but before JIT obtained a Certificate of Authorization from the Association. The allegations against L involved failing to remedy deficiencies in a building permit application and failing to complete contracted work and to respond to a client's inquiries. The allegation against JIT was providing engineering services without a COA. By the time of the discipline proceeding, JIT had obtained its COA.

The Discipline Committee dismissed the allegations against JIT, concluding that although JIT held a COA at the time of the hearing, the Committee lacked jurisdiction over JIT's conduct because it occurred prior to licensure. It also dismissed all of the allegations against L, aside from the allegation that he provided engineering services when JIT was not a holder of a COA. The Association appealed from the orders dismissing the allegations against JIT and L.

DECISION: Appeal dismissed.

The Court held that the question of whether the Committee had jurisdiction must be answered by conducting a contextual interpretation of the legislation. It concluded that Committee's interpretation of the legislation was both reasonable and correct.

The Court noted that s. 28 of the *Professional Engineers Act*,[15] which sets out the Committee's statutory powers, does not expressly include the power to regulate pre-registration conduct. Instead, it authorizes the Committee to

[15] RSO 1990, c P.28.

discipline "*a member of the Association* or a *holder of a certificate of authorization*" if the member or hold "has been guilty … of professional misconduct as defined in the regulations" or has been found guilty of an offence relevant to suitability to practise. Section 12 of the Act specifies that a licence is required to engage in the practice of engineering, and s. 40 provides that "*any person*" who contravenes s. 12 or engages in unauthorized practice is guilty of an offence on conviction and is liable for a fine. Section 40 does not use the more restrictive language of "*a member of the* Association" or "a *holder of a certificate of* authorization" found in s 28, and the sanctions set out under s 40 are not included in s 28. This, along with the fact that the Act expressly provides for consideration of past conduct in other circumstances, supported a conclusion that s 28 was drafted with the intention of excluding the power to discipline members or holders for pre-licensure conduct.

COMMENTARY: The Court in this case tried to reconcile a line of inconsistent court decisions about whether regulators have jurisdiction over members for their unprofessional conduct before they were registered, while focussing in on the specific statutory language at issue. Notably, the Court appeared to favour a more restrictive reading of the legislation, rather than a broad and liberal approach, as was advocated by the Association.

The Court characterized professional regulation legislation as "penal" in nature, given that one of its purposes is to discipline members of the profession. Due to the serious consequences for a person's livelihood that flow from being subject to a regulatory scheme, the legislation should be narrowly interpreted in favour of the professional being disciplined. As the Association argued, that approach is inconsistent with more recent court decisions, which have moved away from the strict approach to statutory interpretation. These recent cases have emphasized the fact that professional regulation legislation is, at its core, remedial in nature and designed to protect the public. As such, a broad and purposive approach is warranted to ensure that the statutory mandate is not frustrated. For example, in *Abdul v Ontario College of Pharmacists* (discussed above), the Court of Appeal for Ontario held that "the interpretive principle of strict compliance with and construction of professional discipline legislation to ensure procedural fairness to accused members is not overriding. The Discipline Committee is required to interpret its enabling statute with a view to protecting the public interest in the proper regulation of the professions".[16] Further, where professional regulation legislation has been strictly construed, the case typically involves issues of procedural fairness, which were not at issue in this case.[17]

This is not to say that the Court in *Leung* ignored the purpose of the statute or failed to conduct a contextual analysis. However, we question whether in adopting a strict approach to statutory interpretation, the Court gave adequate consideration to the Association's public interest mandate.

This case will surely be of interest to regulators whose statutes are silent or ambiguous on the issue of whether the regulator has jurisdiction over past conduct, as it may serve as a precedent for the approach to statutory interpretation in those cases.

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[16] 2018 ONCA 699 at para 16. See also, *Ontario College of Pharmacist v 1724665 Ontario Inc. (Global Pharmacy Canada)*, 2013 ONCA 381, at para 61; *College of Nurses of Ontario v Mark Dumchin*, 2016 ONSC 626 (Div Ct) at para 33; *Beitel v The College of Physicians and Surgeons*, 2013 ONSC 4658 (Div Ct) at para 42; *College of Physicians and Surgeons of Ontario v Sazant,* 2012 ONCA 727 at paras 99, 101

[17] See *Henderson v College of Physicians and Surgeons of Ontario*, 2003 CanLII 10566 (ONCA)

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THE NEWSLETTER

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